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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 67.

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioners, for the **first time since their arrest,** now contend before this Court that an alleged Section 369 of the General Code of the City of Birmingham of 1944 is involved in the instant controversy (p. 2). This section purportedly requires restaurant operators to provide separate facilities for members of the white and colored races (ibid.).

Since Petitioners made no issue of any such ordinance in the state courts, your Respondent respectfully submits that any such ordinance is not an appropriate subject for controversy in this proceeding.

Respondent further urges that Section 1 of the Fourteenth Amendment to the Constitution of the United States (p. 2) is in no way involved in this proceeding, since neither the **aiding and abetting** ordinance (Section 824), nor the **trespass after warning** ordinance (Section 1436), involve or are in any way predicated upon racial or other considerations finding protection in the Fourteenth Amendment.

STATEMENT IN OPPOSITION TO QUESTION PRESENTED FOR REVIEW.

Petitioners present a single question for the review of this Court (p. 3).

The question is predicated upon the supposition that "Alabama has convicted petitioners" of inciting or aiding or abetting another to go or remain on the premises of another after being warned not to do so.

Petitioners then propose for review by the Court the question of whether, in convicting and sentencing the petitioners, "has Alabama denied liberty, including free speech, secured by the due process clause of the Fourteenth Amendment?"

The State of Alabama is not a named party in the case, and so far as the City of Birmingham, the respondent named in this cause, is aware, no effort has been exerted at any time to make the State of Alabama a party. Since "Alabama" was not a party to the case below, and is not a named party before this Court, the sole question presented here for review seems entirely and completey **moot**.

Petitioners take occasion to also predicate their question presented for review (p. 3) upon the hypothesis that "a Birmingham ordinance requires racial segregation in restaurants".

The petitioners' reference to such an alleged ordinance is made here before this Court for the **very first time** since the arrest of the petitioners and is not an appropriate matter to be considered by this Court. To otherwise rule would deprive the state courts of an opportunity to pass upon the validity or non-validity of local laws and thereby circumvent the entire state appellate procedures.

ARGUMENT.

I.

Statutory Provisions Involved.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

The alleged ordinance requires a restaurant operator to maintain certain partitions and entrances for white and colored persons in eating establishments (pp. 2, 10).

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, v. Missouri**, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier decision of this Court in **Allen-Bradley Local, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

The records before this Court clearly show that petitioners have never placed before the **state courts** the matter of any such ordinance requiring separation of the races, although lengthy and detailed pleadings were interspersed throughout all of the student sit-down cases (**Gober et al.**, now here in No. 66), as well as the instant case.

Petitioners argue that an Alabama statute requires that ordinances of the City of Birmingham be judicially recognized (p. 9—Footnote 5). Respondent agrees that its ordinances are judicially noticeable, but only in appropriate instances.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading, Gulf, M. & N. R. Co. v. Weldy**, 8 So. 2d 249, 193 Miss. 59, 144 A. L. R. 930, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**), would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below, petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court (R. 41, 42).

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is de-

prived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and further, that no assignment of error before the state appellate court made any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question relating to the validity of the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly before this Court for review. To rule otherwise would completely dispense with the need for filing pleadings since the Court would be required, under petitioners' theory, to at all times be alert to every ordinance of the City of Birmingham and to place them in issue whenever same might be applicable, thereby placing the burden upon the Court to, in effect, act as counsel for the person in whose favor the ordinance might operate.

II.

Fourteenth Amendment Does Not Require Reversal of Petitioners' Conviction.

A. There is evidence in the record upon which petitioners' conviction may be affirmed.

Petitioners argue that "there is no evidence in the record on which these convictions may be affirmed" (p. 7).

An examination of the record reveals that on the evening of March 30, 1960 James Gober (one of the participants in the sit-downs) went to Rev. Shuttlesworth's house

(R. 23, 27, 28); there were several people present (R. 28); Rev. Shuttlesworth and Rev. Billups were there (ibid); the meeting was in the living room of Rev. Shuttlesworth's house (ibid); Rev. Shuttlesworth participated in the discussion about the sit-downs (ibid); Rev. Shuttlesworth asked for volunteers to participate in the sit-downs (ibid); someone in the meeting made up a list (R. 30); Rev. Billups came to his (James Albert Davis, a participant in the sit-down demonstrations) school in a car and carried him to Rev. Shuttlesworth's house (R. 31); in response to Rev. Shuttlesworth asking for volunteers to participate in the sit-downs, James Albert Davis volunteered to go to Pizitz at 10:30 and take part in the sit-downs (ibid); that Rev. Shuttlesworth made the announcement that he would get them out of jail (R. 31, 32); that James Gober, James Albert Davis, and other boys attending the meeting at Rev. Shuttlesworth's house participated in sit-downs in downtown stores on March 31, 1960 (R. 33).

The foregoing facts and events are substantially as stated in petitioners' brief. There being no dispute as to the facts, the crux of the matter resolves itself around the question of whether these facts constituted "any evidence" upon which the state court could conclude that Rev. Shuttlesworth or Rev. Billups had in any manner incited, aided or abetted another to go upon the premises of Pizitz Department Store, or any other store, and remain thereon "after being warned not to do so"; or, as stated by petitioners in brief, is the record "barren of any evidence" of such fact, as in **Thompson v. City of Louisville**, 362 U. S. 199.

To answer this question, may we direct the Court's attention to available facts as shown by the record and as admitted by petitioners. Petitioners have informed this Court that the current wave of sit-downs is nothing new (p. 9). (The complaints in the instant cases were filed

October 11, 1960.) Petitioners asserted in the state courts that sit-downs are "well recognized symbols" (see Petition for Certiorari in **Gober et al.**, a companion case, now before the Court in No. 66, p. 17, 1st paragraph). Petitioners assert and quote authority for the proposition that sit-downs "are by their inherent and manifest nature a protest against racial discrimination" (p. 10).

Petitioners inform us that the participants in the sit-downs were at all times peaceful (pp. 10, 11); that under the alleged Section 369 of the respondent's City Code restaurant operators were required to furnish certain partitions and separate entrances for white and colored races (p. 2). The record shows that Rev. Shuttlesworth asked "for volunteers to participate in the sit-down strikes" (R. 31); Davis "volunteered to go to Pizitz (department store) at 10:30 and take part in the sit-down demonstrations"; that Rev. Shuttlesworth "participated in the discussion about the sit-down demonstrations" (R. 28) and announced "he would get them out of jail" (R. 31, 32).

Admittedly, the participants were peaceful. Certainly they were not to be arrested for breaching the peace. The operators of the eating establishments, **not the customers**, were punishable under the alleged ordinance pertinent to restaurants. Certainly the state court should not have assumed that the customer was to be arrested for the operators' shortcomings, if any, under some newly alleged ordinance which was never injected into the case from the time of the arrest of the petitioners until after the case had left the state courts; especially is this true in the absence of any showing by petitioners that the eating establishments failed to comply with such ordinance by failure to provide partitions, etc. The obvious arrest contemplated was the arrest which would ensue when the participants in the sit-downs refused to leave when requested to do so. While respondent submits there is no

other conceivable interpretation to be placed upon the assurance of getting the participants out of jail, if the state court had **any reason whatever** to assume from the evidence this to be true, then the rule of the **Thompson case**, supra, has been overcome.

But going further, it must be remembered that sit-downs were an established fact of life when petitioners were tried in the state court. Petitioners tell us they predated by far the instant trials (p. 9), which, of course, is a commonly known fact. Petitioners say **"sit-downs"** are a "well recognized symbol"; that by good authority **"sit-downs"** are known to have "inherent and manifest" characterizations. At Rev. Shuttlesworth's meeting, **"sit-downs"** were discussed (R. 28); volunteers were solicited to participate in **"sit-down demonstrations"** (ibid); one Davis volunteered to take part in the **"sit-down demonstrations"** (R. 31).

From every indication, everyone at Rev. Shuttlesworth's meeting knew what a **"sit-down"** was. Legal periodicals are presumed to know what a **"sit-down"** is; **"sit-downs"** had "well recognized" attributes. National and local publications had sensationalized them with detailed accounts. Not once in the trial court did counsel for petitioners offer any objection to use of the term "sit-down" as being vague or undefinable. Neither they nor any of the witnesses were mystified by the use of the term but appeared to the contrary to be quite familiar with it. Everyone is apparently presumed to know what a "sit-down" is except the Alabama courts, when they say a sit-down is "a form of trespass after warning" and "denotes a violation of both State law, and especially of Section 1436 of the City Code, supra" (R. 43, 44).

Bearing in mind that the petitioners were tried in the absence of a jury at their own behest, the trial court had

every latitude granted by law to jurors. The court had not only the authority, but a duty imposed by law to draw all reasonable inferences from the facts in evidence, in the light of common knowledge, common sense and human experience in arriving at its verdict. **Southern Coal & Coke Co. v. Swinney**, 149 Ala. 405, 42 So. 808; **Hancock v. Kelly**, 81 Ala. 368, 2 So. 281. Certainly no rational jury would have assumed after Rev. Shuttlesworth's discussion of the sit-downs and his promise to get the participants out of jail, that they were simply to walk to the eating counters, ask to be served, and leave the premises when requested to do so. The state court would have been remiss had it not concluded from the promise to free the participants in the sit-downs that they were to be defiant of the property owners' directive to leave and remain seated at the luncheon counters, as was so demonstrably shown to be the case in **Gober et al.**, now before the court as a companion case (No. 66). But again, this Court is not here concerned with the **wisdom** of the state court's finding, or the **sufficiency of the evidence, Garner**, supra, but with whether it was based upon **any evidence**, as required by the **Thompson case**, supra.

Conceding for the sake of argument alone that the state court might have reached a different conclusion as to the effect of the evidence, certainly there was an abundance of evidence to support its finding as distinguished from the **Thompson** case.

The analogy of these cases by the Alabama Court of Appeals to the sit-down strikes in **National Labor Relations Board v. Fansteel Metallurgical Corporation**, 306 U. S. 240, seems so patently applicable as to warrant no argument from respondent in its support, except to say that nothing that has heretofore been before the courts offers a better parallel. Each attracted great attention to its cause, and each invaded the rights of others.

As to the part played in the sit-downs by Rev. Billups, the record reveals that he went to the school of one of the participants in the sit-downs and carried him to the meeting wherein the sit-downs were discussed (R. 31), and wherein volunteers were solicited to participate in the sit-downs (ibid). It cannot be assumed that he was not part and parcel of the scheme to stage the sit-downs in the absence of some evidence that he recused himself in some fashion. The record reveals that he did not testify and thereby avail himself of an opportunity to negative or otherwise explain his presence and participation in the meeting, as well as his procuring persons to attend the meeting.

Mr. Chief Justice Warren, in the Court's opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248, 253 (1961), stated, "We, of course, are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the **evidence** for the purpose of determining whether that evidence supports the findings of a state court."

While there has been no occasion for the Alabama appellate courts to interpret Section 824 of the City's Code, a very similar state statute, **Section 14 of Title 14, Code of Alabama, 1940**, says in part as follows: "* * * And all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, **or aid or abet** (emphasis supplied) its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

The foregoing state statute has been construed by the state courts on many occasions. **Davis v. State**, 36 Ala. App. 573, 62 So. 2d 224, states, "The words 'aid and abet' comprehend all assistance rendered by acts or words of

encouragement or support. * * * **Nor is it necessary to show prearrangement to do the specific wrong complained of.**" (Emphasis supplied.)

In **Pruett v. State**, 33 Ala. App. 491, 35 So. 2d 115, the Court said, "Aid and abet comprehend all assistance rendered by acts or words of encouragement * * *", citing **Jones v. State**, 174 Ala. 53, 57 So. 31, 32.

Alabama has further ruled, "The participation in a crime and the community of purpose of the perpetrators need not be proved by direct or positive testimony, but may be inferred from circumstantial evidence." **Parsons v. State**, 33 Ala. App. 309, 33 So. 2d 164.

While the state statute differs from the city law primarily in the fact that the word "incite" is not found in the state statute, the net effect of the inclusion of the word "incite" in the city law could do no less than enlarge the scope of the city's ordinance beyond that of the state statute.

The salient features of the Alabama decisions, supra, are that **acts or words of encouragement** are sufficient to bring an offender within the scope of the statute; that it is not necessary to show prearrangement to do the **specific wror complained of**; and that the community of purpose may be inferred from **circumstantial evidence**.

Petitioners contend, "Moreover, there is no evidence in this record to sustain a finding that these volunteers did in fact remain on the premises of another after being duly warned not to do so." While your respondent does by no means concede this to be a fact, the argument has no effect upon the question of whether petitioners incited or urged someone to violate a city ordinance. As mentioned earlier, the state statute does not include the word "incite"; consequently, there are no prior Alabama deci

sions on the point. However, it has been many times held that one inciting or soliciting another to commit an offense, even though the solicitation is of no effect and the offense counseled is not committed, is nonetheless guilty. **State v. Bowles**, 70 Kan. 821, 79 P. 726, 69 L. R. A. 176; **State v. Hampton**, 210 N. C. 283, 186 S. E. 251, citing R. C. L.; **Com. v. Randolph**, 146 Pa. 83, 23 A. 388; **State v. Bowers**, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199. Many of the decisions declare inciting or soliciting the commission of an offense to be a common law offense. In the instant case, the inciting is specifically punishable by city ordinance. It can hardly be rationally maintained that the offense of inciting another is dependent upon the occurrence of some subsequent event over which the inciter may in fact be incapable of exercising any control. Only his acts can determine his guilt, and not the acts of others at some future date.

B. **Petitioners have not been deprived of constitutionally protected freedom of assembly or speech.**

Petitioners, in addressing this question, lay great emphasis upon the fact that the meeting place for the discussion of the sit-downs was in a home (p. 11). While this line of argument may undoubtedly in many quarters present some emotional appeal, the home offers little cloak of immunity unless the proscribed acts are required by law to be done in a public place. To dwell upon the subject of the utility of the home as a desirable or non-desirable place for the formulation of plans to perpetrate offenses against the public good will serve no useful purpose discernable to the respondent, and since petitioners offer no authority to the contrary, the fact that the offenses charged was committed in one of the petitioners' homes will not be enlarged upon, other than to stipulate same to be true.

This Court, in **Kovacs v. Cooper**, 336 U. S. 77, 88, stated: "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."

In **U. S. v. Peace Information Center**, D. C., D. C. 1951, 97 Fed. Supp. 255, the court stated: "It is an elementary principle, however, that freedom of speech is not absolute and unlimited, but is bounded by the rights of others than the speaker. For example, no one may disseminate obscene matter in the name of freedom of speech. No one is permitted to make a statement that may incite a riot or create a panic. No one may urge or advise the commission of a crime. No one may justify fraudulent or deceptive advertising * * *. Many a crime is committed purely by word of mouth, such as obtaining money by false pretenses, extortion * * *. This list may be multiplied *ad infinitum*."

"The right of free speech is not absolute and this amendment (14th) to the Federal Constitution does not confer the right to persuade others to violate the law." **Bullock v. U. S.**, 265 F. 2d 683, **cert. denied**, 360 U. S. 909, 932.

Petitioners argue they should be permitted to incite a violation of law where same does not "produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (pp. 11, 12). If the constitutional guaranty afforded one's property does not exceed the criterion of "inconvenience, annoyance, or unrest", as laid down by petitioners, it would appear that private ownership of property is not merely on its way out, but forever gone as one of our most cherished heritages.

It cannot but be of interest to note the frequency with which petitioners voice approval of the constitutional guaranty of freedom of assembly and speech and concur-

rently ignore that provision of the Fourteenth Amendment stating: "Nor shall any state deprive any person of life, liberty **or property** (emphasis supplied) without due process of law." Notwithstanding that the framers of our Constitution thought it appropriate to guarantee **property rights** in the same breath with "**life**" and "**liberty**", petitioners argue that deprivation of property rights does not meet the level of a "substantive evil which the state has the power to prevent" (p. 12).

The case of **Williams v. Howard Johnson**, 268 F. 2d 845, clearly denounces petitioners' parody on the Fourteenth Amendment in affirming that a privately owned restaurant (not involved in interstate commerce) is at liberty to deal only with such persons as it may elect.

Browder v. Gayle, 142 F. Supp. 707, further affirms the proposition that one may share his property or business with those whom he may elect unimpaired by the Fourteenth Amendment.

Evidently, court decisions place higher regard upon the rights of property owners than do petitioners, and your respondent respectfully submits that the right of free assembly and free speech does not flood in every direction to the defeasance of the constitutional rights of others.

C. The ordinance for which petitioners were convicted is not so vague as to be constitutionally vulnerable.

Petitioners were convicted for a violation of Section 824 of the General City Code of Birmingham of 1944, which reads as follows:

> "Section 824. It shall be unlawful for any person to incite, or aid or abet in the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

In discussing the vague character of Section 824, petitioners' sole argument addressed to the question is that the ordinance does not "give fair warning to a defendant of what acts are prohibited" (p. 13). A scant perusal of Section 824 of respondent's code reveals that the aiding or inciting of another **to violate any law or ordinance** of the City is a violation of Section 824. It appears to your respondent that one would have to consciously blind himself to the clear import of the words in the ordinance to lack full and complete understanding of their meaning. Your respondent submits that for the ordinance to be any clearer the entire General City Code would have to be recopied into Section 824, and this might not necessarily lend additional clarification. Respondent submits that the ordinance is neither vague, equivocal or difficult of full understanding, but to the contrary is clear and concise in every detail.

CONCLUSION.

For the foregoing reasons, the petitioners' convictions by the Alabama courts should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1962.

F. L. Shuttlesworth and Charles Billups,
Petitioner,

vs.

City of Birmingham,
Respondent.

No. 67

CERTIFICATE OF SERVICE.

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the ..... day of ....., 1962, I served a copy of Respondent's Brief in the above-styled and numbered cause on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing the same in a United States Post Office or mail box, with air mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York, and on the following respective Attorneys of Record for Petitioners, whose addresses are known to Respondent, by depositing the same in a United States Post Office or mail box, with first-class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue North, Birmingham, Alabama, and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

EARL McBEE,
Attorney for Respondent.